

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

LOIS ARNOLD,

Plaintiff,

vs.

DAVID G. PALMER, Trustee, CHRISTINA
J. PALMER, Trustee, ADVANTAGE BANK,
an Ohio Corporation, and JEFFREY SCOTT
ARNOLD, Executor of the Last Will and
Testament of Jeffrey A. Arnold, Deceased,

Defendants.

Civil Action No: 07-C-699

ADVANTAGE BANK,

Third-Party Plaintiff,

vs.

JEFFREY SCOTT ARNOLD, Individually,
SAMANTHA NICOLE FOGGIN,
MELISSA ANN DAILEY, and KELLI BETH
ARNOLD, Beneficiaries of the Estate of Jeffrey
A. Arnold, Deceased,

Third-Party Defendants.

ORDER

This matter came for hearing on the 17th day of April, 2008, pursuant to Defendant Advantage Bank's Motion for Summary Judgment. Plaintiff Lois Arnold appeared by counsel, Richard A. Hayhurst; Defendants David G. Palmer, Trustee, and Christina J. Palmer, Trustee, ("Trustees") appeared by counsel, David G. Palmer; Defendant Advantage Bank ("Advantage Bank") appeared by counsel, William Crichton VI; and Defendant Jeffrey Scott Arnold, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased, ("Executor") appeared by counsel, Robert Bays.

ENTERED
CLERK OF COURT
PAGE 103
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CAROLE JONES

Whereupon the Court acknowledged receipt of Defendant Advantage Bank's Motion for Summary Judgment, the Responses thereto, and all other accompanying documents.

Advantage Bank moves for summary judgment on the issues raised in the Complaint and allowing Advantage Bank to foreclose on its Deed of Trust.

The facts in this matter are not in dispute. Plaintiff is the fee simple owner of residential real property at issue. Plaintiff's ownership arises by virtue of a Deed bearing date November 3, 1998 from Jeffrey A. Arnold and Lois Lynn Arnold, husband and wife, to the same as joint tenants with rights of survivorship and not as tenants in common. On November 5, 2002, Jeffrey A. Arnold and Lois L. Arnold, husband and wife, executed, acknowledged and delivered unto Debora K. Martin Lee, Trustee, a deed of trust bearing said date, whereby Advantage Bank claims to be secured in the repayment of a promissory note in the original principal sum of \$128,000.00 ("Deed of Trust"). The Trustees named in the Complaint were appointed as substitute trustees on or about October 9, 2007. The promissory note ("Note") secured by the Deed of Trust was executed solely by Jeffrey A. Arnold.

On January 20, 2007, Jeffrey A. Arnold died testate in Wood County, West Virginia. Pursuant to the right of survivorship in the real property at issue, Plaintiff became the sole owner of the property.

The estate of Jeffrey A. Arnold was referred to Gerald R. Townsend, Fiduciary Commissioner. The Fiduciary Commissioner published notice to the estate's creditors and established June 6, 2007 as the last date upon which claims against the estate may be filed ("Claims-Bar Date"). Advantage Bank did not file a claim against the estate.

Jeffrey A. Arnold and/or his estate defaulted on the subject loan. Accordingly, Advantage Bank directed its Trustees to foreclose on the Deed of Trust. Thereafter, counsel for

Plaintiff demanded the Trustees cease and desist all foreclosure activities. Advantage Bank and the Trustees have voluntarily stayed all foreclosure activities pending resolution by the Court.

A circuit court should grant a motion for summary judgment if the court finds that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56. A party moving for summary judgment has the burden of showing that "the action involves no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." *Gillespie v. City of Charleston*, 177 S.E.2d 354, 357 (W. Va. 1970).

As a preliminary matter, there appears in this case no genuine issue of material fact and, as such, the issues raised by this Motion are ripe for summary judgment as all that remains is a question of law to be determined by the Court.

It is clear in this case that there is both a promissory note and a deed of trust. While both the Plaintiff and the decedent, Jeffrey A. Arnold, were signatories to the Deed of Trust, only the decedent signed the Note.

The Plaintiff is not liable on the Note, or the underlying debt secured by the Deed of Trust. "The general rule under W.Va. Code 46-3-401 is that no person is liable on an instrument unless his signature appears thereon." *Dobbins v. Cunningham*, 217 W.Va. 580, 582 (2005). W.Va. Code § 46-3-401(a) states: "A person is not liable on an instrument unless (i) the person signed the instrument or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section [46-]3-402." It is clear that the Plaintiff did not sign the Note (or instrument) in this case and, thus, is not liable on the Note, meaning the Plaintiff is not personally obligated to pay the sums due thereunder.

This is further supported by the terms of the deed of trust involved in this matter.

Paragraph 13 of the Deed of Trust provides:

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

It is clear by the terms of Paragraph 13 that the Plaintiff signed the Deed of Trust as a co-signer as she did not also sign the Note. By signing as a co-signer, the Plaintiff signed only to mortgage, grant and convey her interest in the property at issue here and not to be personally obligated to pay the sums secured. The Plaintiff is not obligated on the underlying instrument, the Note at issue here, pursuant to § 46-3-401(a) of the West Virginia Code and the terms of the Deed of Trust. It is apparent that the only party liable on the Note was the decedent and now his estate.

As the Plaintiff is not obligated on the Note as it is an individual debt of the decedent, the issue becomes whether or not the Trustees may foreclose on the subject Deed of Trust when the Plaintiff is the sole owner of the property pursuant to operation of the right of survivorship clause in the Deed.

First, it should be noted that "[i]n a suit to enforce a lien securing a negotiable note, the same defenses are generally available as would be in a suit on the note itself." *Syl. Pt. 3, Miller v. Diversified Loan Service Company*, 382 S.E.2d 514 (1989). In this case, it appears that the Plaintiff would have a defense to the Note in that she is not liable for the debt of the Note for the

reasons stated above. As such, it follows that the Plaintiff has a defense to the Deed of Trust securing the Note.

Second, while the Plaintiff has a defense to her personal obligation to pay the debt secured by the Deed of Trust, the Court believes that Advantage Bank seeks to recover on the Note through the decedent's estate's alleged interest in the subject property. In *Dobbins v. Cunningham*, 217 W.Va. 580, 618 S.E.2d 589 (2005), the Supreme Court of Appeals was dealing with a similar set of facts as in this case. In *Dobbins*, there were two parties who owned a tract of land as "joint tenants with right of survivorship and not as tenants in common." *Id.* Using the jointly-owned tract of land as collateral, the parties obtained a loan from a bank. *Id.* Both parties signed the deed of trust, but only one signed the promissory note. *Id.* Upon the breakup of the relationship of the parties, they sought a partition sale and the trial court determined that the debt secured by the promissory note should be the responsibility of both parties. *Id.* In reversing the trial court, the Supreme Court of Appeals determined that the party not signing the promissory note was not liable thereon pursuant to West Virginia Code § 46-3-401 and allowed the partition sale while allocating the debt owed on the promissory note solely to the party that signed it. *Id.* The Supreme Court held that the party not signing the promissory note was not personally liable for and her interest in the property was not subject to the debt, even though she signed the Deed of Trust.

Here, the Plaintiff and the decedent owned the property as joint tenants with right of survivorship and not as tenants in common and used the property as collateral to obtain a loan from Advantage Bank. To secure the loan, the decedent alone signed the Note while both parties signed the Deed of Trust. Therefore, the Plaintiff is not obligated by her signature on the Deed of Trust to pay the debt secured by the Note and, it follows, her interest in the property is not

subject to the debt. It is clear that the debt secured by the Note was an individual debt of the decedent and remains a debt of his estate.

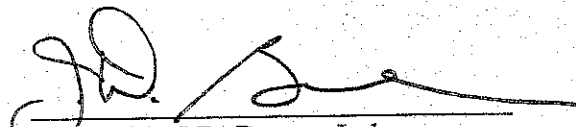
As the Plaintiff is not obligated on the debt secured by the Note and her interest in the property is not subject to that debt, it must be determined what, if any, interest the decedent's estate would have in the property. It appears clear that a creditor can acquire no better right to the property of the debtor than the debtor himself would have. *Syl. Pt. 3, Snyder v. Botkin*, 37 W.Va. 355, 16 S.E. 591 (1892); see generally 99 W.Va. L. Rev. 637, Fisher, John W., II, Creditors of a Joint Tenant: Is There a Lien After Death?. As the debtor, the decedent here, is no longer living therefore it is necessary to determine the decedent's estate's interest in the property in order to determine what right Advantage Bank, as the creditor, would have to the property.

Any rights that the decedent would have to the property at issue would arise by virtue of the Deed bearing date November 3, 1998. As the Deed clearly states, the Plaintiff and the decedent held the property as joint tenants with right of survivorship and not as tenants in common. When there is a survivorship provision in a deed, upon the death of one of the joint tenants his ownership interest ceases to exist and the survivor becomes the sole owner of the property. At the moment of death, there is no interest to pass to the estate and, as such, the estate receives no interest or rights in the property. While it appears that the Supreme Court of Appeals has never directly addressed this issue, it appears that a creditor's rights against a joint tenant rise no higher than the joint tenant's rights and interest, and that when a joint tenant dies survived by a joint tenant, his/her rights in the property cease to exist along with any claim a creditor has to the property. See 99 W.Va. L. Rev. at 677. Therefore, the decedent's estate has no rights or interests in the property at issue and, thereby, Advantage Bank does not have any rights or interests in the property.

Finally, Advantage Bank appears to assert that the Plaintiff signed the Deed of Trust and by the language of Paragraph 13 thereof has mortgaged, granted, and conveyed her interest in the property so that Advantage Bank through the Trustees may foreclose on the Deed of Trust. Based on this language it may be true that Advantage Bank has the power to foreclose and sell the subject property. However, it appears that upon such a sale, the Plaintiff would be entitled to the proceeds of such sale with no obligation to pay the debt secured by the Note. In essence, Advantage Bank would sell the property and then hand the proceeds over to the Plaintiff. This would be an absurd result and the Court finds no reason to allow this to occur, especially when the property may be sold to a third party and the Plaintiff, who obviously desires to remain on the property, would be forced to find a new residence.

For the reasons stated above, the Defendant's Motion for Summary Judgment is **DENIED.**

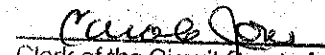
ENTER this 18th day of August, 2008:


Honorable J.D. Beane, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 18 day of August, 2008, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 9 day of October, 2008


Clerk of the Circuit Court of
Wood County, West Virginia

By: J. W. O. O. Deputy